Supreme Court, U.S.
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No. 00-426

In The

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

MOHAMMED AL-SAFIN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court review the decision of the Ninth Circuit to decline jurisdiction over Circuit City's appeal brought pursuant to the interlocutory appeal provision in the Federal Arbitration Act, in reliance upon its decisions in *Circuit City Stores, Inc. v. Adams,* 194 F.3d 1070 (9th Cir. 1999) (per curiam), *cert. granted,* 120 S.Ct. 2004 (2000) and *Craft v. Campbell Soup Co.,* 177 F.3d 1083, 1094 (9th Cir. 1998) (per curiam), which held that the Federal Arbitration Act does not apply to contracts of employment?

2. Should this Court review the decision of the Ninth Circuit, which implicitly accepted the trial court's determination that an arbitration agreement required as a condition of application for employment is a contract of employment?

LIST OF PARTIES

The caption of Circuit City's Petition for Writ of Certiorari contains the names of all parties.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Mohammed Al-Safin ("Mr. Al-Safin") does not oppose this Court's review of the first question presented by Petitioner Circuit City Stores, Inc. ("Circuit City"), namely, whether the Federal Arbitration Act ("FAA") applies to contracts of employment. This Court has already granted review of essentially the same question (and only that question) in *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999) (per curiam), *cert. granted*, 120 S.Ct. 2004 (2000).

Mr. Al-Safin respectfully prays that this Court deny Circuit City's request for review of the second question presented, namely, whether an arbitration agreement signed as a condition to being considered for employment constitutes a contract of employment.

OPINIONS AND ORDERS BELOW

Circuit City has accurately appended the relevant opinions and orders entered below in its Appendix to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The Order from which Circuit City appeals was entered by the United States Court of Appeals for the Ninth Circuit on August 11, 2000. Jurisdiction in this Court is appropriate under 28 U.S.C. § 1254(1) (1994).

STATUTES INVOLVED

Circuit City accurately set forth the statutes involved in this case in its Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Mr. Al-Safin is a Jordanian Muslim who worked as a computer sales counselor for Circuit City from June 1997 until his discharge in November of 1998. App. 1a.[1]

When Mr. Al-Safin applied for employment with Circuit City, he was required to sign a Dispute Resolution Agreement ("DRA") as a condition of being considered for employment. The DRA required, *inter alia*, that all claims of employment discrimination be submitted to arbitration. The DRA further required that any such claims be brought within one year (as opposed to the three-year limitation period for judicially-litigated suits), and imposed limitations on awards of back pay, future pay and punitive damages that were different from those imposed in a judicial forum. App. 2a.

Mr. Al-Safin alleged below that he was directed to sign the DRA without adequate time to read it; that the significance of the agreement was never discussed with nor explained to him; that he was never provided with a copy of the agreement; and that he was never provided

[1] Reference to "App." is to the Appendix to Circuit City's Petition for Writ of Certiorari.

with a copy of the Dispute Resolution Rules and Procedures (as the DRA itself requires). These allegations were uncontroverted by Circuit City. App. 2a.

Following his discharge in November of 1998, Mr. Al-Safin commenced the lawsuit below. He claims that he was discharged in retaliation for complaining of discriminatory treatment at Circuit City, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., 42 U.S.C. § 1981, and the Washington Law Against Discrimination, RCW 49.60. App. 1a-2a.

In response to Mr. Al-Safin's lawsuit, Circuit City moved to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994) ("FAA"). That motion was denied by the district court. App. A. The district court decision was based in part on the determination that the DRA was indeed a contract of employment.

> The argument that the DRA (which is a condition of employment for any potential applicant and which purports to determine in what fashion employment disputes may be resolved) is something other than an "employment contract" is not one which appeals to logic or common sense.

App. 4a.

Having found that the arbitration agreement in question was a contract of employment, the district court denied Circuit City's motion to compel arbitration based on the Ninth Circuit's holding in *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1998) (per curiam) that the FAA does not apply to contracts of employment.

Circuit City next appealed the denial of the motion to compel arbitration to the United States Court of Appeals for the Ninth Circuit pursuant to the interlocutory appeal provisions of the FAA (9 U.S.C. § 16 (1994)). This appeal was ultimately dismissed by the Ninth Circuit, which declined jurisdiction based on its earlier holding in *Craft*.

Circuit City now requests review of both the *Craft* holding, and the determination by the district court that an arbitration agreement entered into as a condition of being considered for employment is a contract of employment.

REASONS FOR DENYING THE WRIT

As stated above, Mr. Al-Safin does not oppose review of the Ninth Circuit's holding that the FAA does not apply to employment contracts, the first question presented for review.

Mr. Al-Safin opposes review of the trial court's determination that an arbitration agreement that is a condition of being considered for employment is a contract of employment. This Court has already denied review of this second question in the *Adams* case. *Circuit City Stores, Inc. v. Adams*, 120 S.Ct. 2004 (2000).

The district court held that the arbitration agreement between Mr. Al-Safin and Circuit City, entered into as a condition of being considered for employment, was part of Mr. Al-Safin's contract of employment with Circuit City. The Ninth Circuit then denied jurisdiction under the FAA because of its view that the FAA does not apply to

contracts of employment. Circuit City claims that the arbitration agreement is not a contract of employment.

In support of its argument, Circuit City cites *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). But *Gilmer* says nothing about whether a written arbitration agreement between an employer and employee, entered into as a condition of being considered for employment, is a "contract of employment" for purposes of the FAA.

In *Gilmer*, the arbitration clause in question was contained in the securities registration application of a broker who later had a dispute with his employer. The arbitration agreement was not entered into between the broker and his employer. In expressly declining to answer the question of whether such an arbitration agreement is covered by the FAA, the *Gilmer* court stated in dicta that such an agreement "is not contained in a contract of employment," because the agreement was "a contract with the securities exchanges, not with [the employer]." *Gilmer*, 500 U.S. 20, 25-26, n. 2.

Circuit City likens the arbitration clause in *Gilmer* to the one signed by Mr. Al-Safin, calling them both "separate, stand-alone" agreements. But, unlike the agreement in *Gilmer*, the arbitration agreement in Mr. Al-Safin's case was made with his employer. The fact that he was required to sign the agreement as a condition of even being considered for employment, inextricably ties the agreement to his contract of employment.

Circuit City sets forth no reason for this court to consider its second question. There is no disagreement among the U.S. Courts of Appeal on this issue. Furthermore, the extent to which any arbitration agreement is

part of a contract of employment is a matter of state law. This Court should decline to review the question.

CONCLUSION

For the foregoing reasons, Circuit City's Petition for Writ of Certiorari should be denied as to its second question, namely, whether an arbitration agreement entered into as a condition of being considered for employment becomes part of the contract of employment of a subsequently hired employee.

DATED: October 20, 2000

Respectfully submitted,

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